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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/767,441

01/30/2004

Mark L. Lawrence

2343-179-27

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06/19/2007

DLA PIPER US LLP

ATTN: PATENT GROUP

1200 NINETEENTH STREET, NW

WASHINGTON, DC 20036

EXAMINER

MINNIFIELD, NITA M

ART UNIT

PAPER NUMBER

1645

MAIL DATE

DELIVERY MODE

06/19/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/767,441

Applicant(s)

LAWRENCE ET AL.

Examiner

N. M. Minnifield

Art Unit

1645

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 March 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4,6-10 and 12-40 is/are pending in the application.
- 4a) Of the above claim(s) 15-39 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4,6-9,12,14 and 40 is/are rejected.
- 7) ☒ Claim(s) 10 and 13 is/are objected to.
- 8) ☒ Claim(s) 15-39 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

1. Applicants' amendment filed March 23, 2007 is acknowledged and has been entered. Claims 5 and 11 have been canceled. Claims 1-4, 6-10 and 12-14 have been amended. New claim 40 has been added. Claims 1-4, 6-10 and 12-40 are now pending in the present application. Claims 1-4, 6-10, 12-14 and 40 have been examined in the instant application. All rejections have been withdrawn in view of Applicants' amendment to the claims and/or comments, with the exception of those discussed below.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. This application contains claims 15-39 drawn to an invention nonelected with traverse in the reply filed on September 29, 2006. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

4. Claims 1-4, 14 and 40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are vague and indefinite in the recitation of "a sequence as set forth in SEQ ID NO: 9". It is not clear what Applicants intend by this phrase. Does Applicant mean the whole nucleic acid sequence set forth in SEQ ID NO: 9, for example, or some portion of

SEQ ID NO: 9, as in a fragment? Does Applicant intend for this phrase to mean two nucleic acids of SEQ ID NO: 9? This recitation encompasses nucleic acids that comprise the full-length sequence of SEQ ID NO: 9 or any portion of SEQ ID NO: 9? Clarification and/or correction is requested.

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1-4, 6-9, 12, 14 and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by Kunst et al (WO 2002/28891).

Kunst et al discloses isolated nucleic acid sequences of *L. monocytogenes*. The claimed sequences, SEQ ID NO: 9 are disclosed (see also attached sequence search report printout). SEQ ID NO: 2870 discloses claimed SEQ ID NO: 9. Kunst et al also discloses that the sequences are useful as probes and primers for identification and/or detection of *Listeria* contamination. The prior art anticipates the claimed invention.

Since the Patent Office does not have the facilities for examining and comparing applicants' isolated nucleic acid of *L. monocytogenes* with the isolated nucleic acid of *L. monocytogenes* of the prior art reference, the burden is upon applicants to show a distinction between the material structural and functional characteristics of the claimed isolated nucleic acid of *L. monocytogenes* and the isolated nucleic acid of *L. monocytogenes* of the prior art. See In re Best, 562 F.2d 1252, 195 USPQ 430 (CCPA 1977) and In re Fitzgerald et al., 205 USPQ 594.

Applicant's arguments filed March 23, 2007 have been fully considered but they are not persuasive. Applicants have asserted that "Exhibits G and H represent the nucleic acid sequences denoted by sequence identifiers 2870 and 2909 of Kunst et al. At minimum, because both SEQ ID NO: 2870 and 2909 have fewer nucleotides than SEQ ID NO: 9 (2556/759 vs. 2640), SEQ ID NO: 2870 and 2909 are not identical to SEQ ID NO: 9, and thus, do not anticipate SEQ ID NO: 9 as claimed." (see Remarks, p. 12) However, it is noted that the claims have been broadly interpreted and in view of the indefiniteness of claim 1 (see above), Kunst et al discloses a nucleic acid comprising a sequence as set forth in SEQ ID NO: 9. Kunst et al discloses a portion or fragment of SEQ ID NO: 9. The source of the DNA is *L. monocytogenes* serovar 4b.

7. Claims 10 and 13 are objected to because they depend from a rejected claim.
8. No claims are allowed.
9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).


A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened

statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. M. Minnifield whose telephone number is 571-272-0860. The examiner can normally be reached on M-F (8:00-5:30) Second Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jeffrey Siew can be reached on 571-272-0787. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.


N. M. Minnifield
Primary Examiner
Art Unit 1645

NMM
June 10, 2007